

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

CLARK COUNTY SCHOOL DISTRICT,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY  
COMPANY OF AMERICA,

Defendant.

Case No. 2:13-cv-01100-JCM-PAL

ORDER

(Mot for Determination – ECF No. 133)

Before the court is Defendant Travelers Casualty and Surety Company of America Motion for Determination of Good Faith Settlement (ECF No. 133) which was referred to the undersigned for a decision pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4. The court has reviewed the motion and attached supporting Affidavit (ECF No. 134), Plaintiff's Response (ECF No. 135), Defendant's Reply (ECF No. 136), and Exhibit to the Motion (ECF No. 140).

**BACKGROUND**

The Complaint (ECF No. 1) in this case was filed June 21, 2013. Clark County School District ("CCSD") filed an Amended Complaint (ECF No. 9) August 19, 2013, asserting claims for: (1) mandatory injunction to compel specific performance; (2) breach of contract; (3) contractual breach of the covenant of good faith and fair dealing; (4) tortious breach of the covenant of good faith and fair dealing; and (5) declaratory relief. The complaint arises out of written contracts CCSD entered into in May 2010, with general contractor Big Town Mechanical, LLC ("BTM") to modernize heating ventilation and air conditioning ("HVAC") systems in 15 schools within the district. Travelers Casualty and Surety Company of America ("Travelers") issued 15 separate performance bonds and payments bonds naming BTM as the principal and CCSD as the owner/obligee on the bonds.

1 BTM began work on the 15 school projects as specified in the contracts. In late-2012 to  
2 early-2013, BTM submitted a series of claims to CCSD seeking payments for additional costs  
3 that BTM claimed to have incurred in connection with the 15 projects as a result of claimed  
4 unpaid contract balances, change order amounts, and extra work BTM was directed to perform.  
5 BTM also made delay and disruption claims against CCSD. The aggregate amount of BTM  
6 claims totaled \$6.5 million.

7 CCSD rejected all of BTM's claims and on May 14, 2013, BTM filed for bankruptcy  
8 protection. In December 2013, CCSD and Travelers entered into a Takeover Agreement for  
9 Travelers to complete BTM's projects as surety. Travelers entered into a contract with Sletten  
10 Construction of Nevada ("Sletten") to complete the projects, and paid Sletten approximately \$5  
11 million.

12 On July 3, 2013, the undersigned granted Travelers leave to file a counterclaim for breach  
13 of contract and contractual breach of the implied covenant of good faith and fair dealing. The  
14 parties subsequently submitted a stipulation which the court approved to continue the discovery  
15 plan and scheduling order deadlines to allow for project completion on November 14, 2014  
16 (ECF No. 48). The court also approved a stipulation granting the parties' request to extend the  
17 discovery deadline to September 7, 2015 (ECF No. 56).

18 Travelers applied for and received permission from the U.S. Bankruptcy Court in this  
19 district to prosecute all of BTM's claims against CCSD related to the contracts and the project on  
20 May 19, 2014.

21 In an order (ECF No. 59) entered January 12 2015, the district judge granted CCSD's  
22 motion for partial summary judgment on the pleadings with respect to Travelers fourth claim for  
23 relief, tortious breach of the covenant of good faith and fair dealing. The order denied CCSD's  
24 motion for partial summary judgment without prejudice and Travelers motion for a Rule 56(d)  
25 continuance as moot finding he could not conclude that CCSD was entitled to liquidated  
26 damages for all delays as a matter of law and that Travelers should be afforded an opportunity to  
27 complete discovery regarding the causes of delays at issue.

1           On October 19, 2015, after the close of discovery, CCSD filed a Motion in  
2   Limine to preclude Travelers from introducing evidence regarding certain counterclaims and  
3   defenses (ECF No. 114), a Motion for Partial Summary Judgment seeking a determination that  
4   BTM, and therefore Travelers, did not provide the required contractual notice of BTM's claims  
5   (ECF. No. 112), and a Motion for Partial Summary Judgment seeking a determination that  
6   Travelers' wrongful termination counterclaim is barred (ECF No. 113). These motions are now  
7   fully briefed and under submission to the district judge.

8           In this case Travelers, standing in BTM's shoes, claims CCSD owes it approximately  
9   \$6.5 million. CCSD's pending motion for partial summary judgment seeks to strike the BTM  
10   claims and counterclaim on the grounds that Travelers may not recover as surety for BTM  
11   because BTM did not comply with the notice provisions of the contracts, and as a result, the  
12   claims are barred. Travelers' counterclaim also asserts a wrongful termination claim asserting  
13   CCSD failed to comply with specific conditions precedent in the contract in order to properly  
14   terminate BTM. Travelers argues that as a matter of law CCSD was required to terminate the  
15   contracts in order to assert a valid claim against Travelers' payment and performance bonds, and  
16   that because it did not do so, it does not have a valid claim against the bonds. Travelers seeks  
17   reimbursement from CCSD for the \$5 million it paid Sletten.

18           On December 1, 2015, CCSD and Travelers mediated their disputes with the assistance  
19   of Floyd Hale, Esq. of JAMS. The motion states the basic terms of the settlement are that  
20   Travelers will pay CCSD \$5 million. CCSD will keep possession of the approximately \$600,000  
21   in contract balance on the contracts. CCSD will grant Travelers an assignment of "certain  
22   rights", and the parties give each other a full and final release of all claims on the projects. At  
23   the time this motion was filed, the settlement agreement was being memorialized in a written  
24   document.

25           In the current motion, Travelers seeks a determination that the settlement reached with  
26   CCSD was made in good faith for purposes of NRS 17.245 which bars all claims against a  
27   settling Defendant for contribution and equitable indemnity. Citing *The Doctor's Company*, 120  
28   Nev. 644, 657, 98 P.3d 681, 690 (2004), Travelers acknowledges that as the moving party, it has

1 the burden of proving that the settlement was, in fact, reached in good faith,. There, the Nevada  
2 Supreme Court held that “[a] settling defendant seeking protection from contribution and implied  
3 indemnity claims has the burden of proving that the settlement was in good faith.” *Id.*

4 Travelers argues that applying the 5-factor test articulated by the Nevada Supreme Court  
5 in *Velsicol Chemical v. Davidson*, 107 Nev. 356, 811 P.2d 561 (1991), compels a determination  
6 that settlement was reached in good faith. Specifically, the settlement amount is \$5 million in  
7 exchange for a complete release and dismissal with prejudice of all claims that CCSD has with  
8 respect to the projects and the bonds Travelers issued. In agreeing to this settlement, Travelers  
9 considered that the legal expenses were increasing, would likely increase and were expected to  
10 be substantial. Additionally, Travelers assessed its risk on the motions filed by CCSD at the  
11 close of discovery. At the time this motion was filed, expert reports and rebuttal reports were  
12 due. Travelers determined that it had substantial litigation risks, and that the pending motions  
13 could be decided against it. In assessing its litigation risks Travelers also acknowledged that it is  
14 difficult to prevail on its counterclaims based upon the BTM claims and wrongful termination of  
15 BTM.

16 Settlement proceeds go directly to CCSD as the sole Plaintiff in this matter. Therefore,  
17 no allocation analysis is needed. The total penal amount of Travelers’ bonds varies from project  
18 to project from a low of \$2,178,000, to a high of \$3,288,000. Thus, CCSD’s claims do not  
19 exceed the penal amount of Travelers’ bonds. A summary of CCSD’s damages claim by project  
20 is attached to the supporting affidavit of John Fouhy (ECF No. 134). CCSD seeks to recover  
21 \$11,463,209.85 from Travelers in this action. Of that, \$245,540.85 is a claim for direct costs and  
22 the balance of \$11,217,750 are contractual liquidated damages claims. In addition, CCSD seeks  
23 interest, and attorney’s fees and costs. A spreadsheet of the damages per project is attached as  
24 Exhibit A to the Fouhy declaration.

25 Turning to the fourth factor, both Travelers and CCSD are financially sound entities and  
26 could therefore bear the financial burden of continued litigation. Finally, Travelers argues that  
27 this case has been hotly litigated for more than two years. The parties have exchanged written  
28 discovery, produced in excess of 200,000 documents, and taken numerous depositions. At the

1 time settlement was reached, more depositions were scheduled. The settlement was reached  
2 through a formal settlement conference with a neutral, Floyd Hale, after extensive negotiations.  
3 Finally, Travelers argues the settlement was not reached through collusion, fraud, or tortious  
4 conduct. For these reasons, Travelers asks the court for a determination that the proposed  
5 settlement was made in good faith for purposes of NRS 17.245.

6 CCSD filed a Response (ECF No. 135) asserting it had no objection to the relief sought  
7 in Travelers' motion. It agreed that on December 4, 2015, CCSD and Travelers reached a  
8 settlement in which Travelers agreed to pay it \$5 million as compensation for numerous delays  
9 caused by BTM's failure to timely complete the HVAC renovations at 15 Las Vegas elementary  
10 schools. In addition, Travelers agreed that CCSD would keep possession of approximately  
11 \$600,000 in remaining contract balances for the projects. Thus, the settlement is effectively \$5.6  
12 million from Travelers to CCSD. Travelers has agreed to a full and final release of all of the  
13 counterclaims it has or may have against CCSD related to the projects, and CCSD has granted  
14 Travelers a full and final release of all of the claims CCSD has or may have against Travelers  
15 related to the projects. CCSD also granted Travelers an assignment of certain rights. CCSD's  
16 response indicated that a written settlement agreement was executed by the parties February 1,  
17 2016, and on February 5, 2016, Travelers paid CCSD the agreed-upon \$5 million settlement  
18 amount. CCSD agrees that the settlement was reached in good faith.

19 Travelers filed a Reply (ECF No. 136) pointing out that CCSD does not oppose the relief  
20 sought.

## 21 **DISCUSSION**

### 22 **I. Magistrate Judge Jurisdiction for Good Faith Settlement Determination**

23 Before addressing the merits of the motion, the court must determine whether a  
24 magistrate judge has jurisdiction to order that a settlement was made in good faith under  
25 NRS 17.245, which in turn prevents later claims for contribution and equitable indemnity. Rule  
26 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1) authorize a magistrate  
27 judge to enter orders in non-dispositive matters. 28 U.S.C. § 636(b)(1)(A) lists motions which  
28 may not be determined by a magistrate judge. Any motion not listed generally falls within the

1 non-dispositive group of matters which a magistrate judge may determine. Local Rule IB 1-3  
 2 provides: “A magistrate judge may hear and finally determine any pretrial matter not specifically  
 3 enumerated as an exception in 28 U.S.C. § 636(b)(1)(A).” A motion for finding of good faith  
 4 settlement does not fall within the list of motions which may not be determined by a magistrate  
 5 judge. Accordingly, this Court has jurisdiction to issue an order on this matter.

## 6 **II. Joint Motion for Finding of Good Faith Settlement**

7 The settling parties seek a determination that the settlement among them was made in  
 8 good faith. NRS 17.245 states, in relevant part:

9 When a release or a covenant not to sue or not to enforce judgment is given in  
 10 good faith to one of two or more persons liable in tort for the same injury or the  
 same wrongful death:

11 ...

12 (b) . . . discharges the tortfeasor to whom it is given from all liability for  
 contribution and for equitable indemnity to any other tortfeasor.

13 NRS 17.245(1). Equitable indemnity is defined as “a right of indemnity that is created by the  
 14 court rather than expressly provided for in a written agreement.” NRS 17.245(2). The statute  
 15 was enacted “to encourage settlements by discharging all liability for contribution by a settling  
 16 tortfeasor to others upon a finding that the settlement was entered in ‘good faith’.” *Kerr v.*  
 17 *Wanderer & Wanderer*, 211 F.R.D. 625, 631–32 (D. Nev. 2002) (quoting *In re MGM Grand*  
 18 *Hotel Fire Litig.*, 570 F. Supp. 913, 926 (D. Nev. 1983)). Since a determination by the court that  
 19 a settlement was made in good faith releases the settling parties from further contribution to the  
 20 non-settling parties pursuant to NRS 17.245(1)(b), “the approving court must use its discretion to  
 21 consider the fairness and overall appropriateness of the proposed settlement.” *Duk v. MGM*  
 22 *Grand Hotel, Inc.*, 320 F.3d 1052, 1060–61 (9th Cir. 2003) (citing *Velsicol Chem. Corp. v.*  
 23 *Davidson*, 811 P.2d 561, 563 (Nev. 1991)).

24 Under Nevada law, the determination of whether a settlement is in “good faith” under  
 25 NRS 17.245 is “left to the discretion of the trial court based upon all relevant facts available.”  
 26 *Velsicol*, 811 P.2d at 563. The Nevada Supreme Court reviews the lower court’s determination  
 27 of good faith for abuse of discretion. *Otak Nevada, L.L.C., v. Eighth Jud. Dist. Ct.* 312 P 3d 491,  
 28 496 (2013). The district court abuses its discretion if substantial evidence does not support the

1 decision. *Id.* Substantial evidence is defined “as that which a reasonable mind might accept as  
2 adequate to support a conclusion.” *Id.* (Internal citations and quotations omitted)

3 The Nevada Supreme Court has agreed that the factors discussed by this court in *In re*  
4 *MGM Grand Hotel Fire Litigation*, 570 F. Supp. 913, 927 (D. Nev. 1983), may be among the  
5 relevant facts a court may choose to consider in the exercise of its “considerable discretion.” *The*  
6 *Doctors Co. v. Vincent*, 98 P.3d 681, 686–87 (Nev.2004). These factors include: (1) the amount  
7 paid in settlement; (2) the allocation of the settlement proceeds among plaintiffs; (3) the  
8 insurance policy limits of settling defendants; (4) the financial condition of settling defendant;  
9 and (5) the existence of collusion, fraud or tortious conduct aimed to injure the interests of non-  
10 settling defendants. *In re MGM*, 570 F. Supp. at 927 (citing *Commercial Union Ins. Co. v. Ford*  
11 *Motor Co.*, 640 F.2d 210 (9th Cir. 1981)). However, Nevada law includes no requirement that a  
12 court consider or limit its analysis to the *MGM* factors or hold a hearing before making a  
13 determination of good faith. *Velsicol*, 811 P.2d at 563 (expressly declining to adopt the  
14 “California rule,” contrary to this court’s conclusion in *MGM* ).

### 15 **III. ANALYSIS**

16 Here, BTM declared bankruptcy in the midst of completing 15 HVAC modernization  
17 contracts for CCSD elementary schools. Travelers stepped in as the surety issuing payment and  
18 performance bonds, hired Sletten to complete the work and paid Sletten in excess of \$5 million.  
19 CCSD and Travelers now agree the projects are complete. Before filing for bankruptcy  
20 protection BTM submitted claims against CCSD for additional costs, unpaid contract balances,  
21 and delay and disruption allegedly caused by CCSD totaling \$6.5 million. Travelers applied for  
22 and received leave from the Bankruptcy Court to pursue BTM’s claims against CCSD and filed a  
23 counterclaim in this court to pursue those claims as well as a counterclaim for wrongful  
24 termination of BTM’s contract. CCSD’s claims against Travelers, standing in BTMs shoes,  
25 sought to recover in excess of \$245,000 in direct costs, attorneys’ fees and in excess of \$11  
26 million in contractual liquidated damages. After two years of protracted and expensive litigation  
27 the parties successfully mediated their dispute with the assistance of Floyd Hale, Esq. of JAMS,  
28



1 a highly skilled mediator with decades of construction litigation experience, and an impeccable  
2 reputation for his legal skills and integrity.

3 The parties' moving and responsive papers did not attach a copy of their settlement  
4 agreement. The court requested a copy of the executed agreement to examine settlement terms  
5 and evaluate whether any of the terms suggest evidence of fraud, collusion or tortious conduct  
6 designed to injure non-parties. The settlement agreement has now been filed on the docket as part  
7 of the public record. The court has now reviewed and considered the moving and responsive  
8 papers, and the parties written settlement agreement. Applying the Nevada Supreme Court's list  
9 of non-exhaustive factors for determining whether a settlement agreement was reached in good  
10 faith the court finds the settlement reached was a good faith settlement.

11 The amount of the settlement Travelers paid to CCSD was \$5.6 million when the  
12 \$600,000 CCSD retained in contract balances due BTM is considered. This represents slightly  
13 more than half of the amount CCSD sought in its lawsuit. The amount Travelers paid was  
14 slightly more than half the amount of its exposure given CCSD's contractual liquidated damages  
15 claim. In addition, Travelers paid in excess of \$5 million to Sletten to complete the work on the  
16 projects. Travelers has therefore paid more than \$11 million in connection with its obligations  
17 under its payment and performance bonds on the project, and released its rights with respect to  
18 the \$600,000 in unpaid contract balances. Both sides acknowledge in their written settlement  
19 agreement that work on the projects is complete.

20 Settlement proceeds went solely to CCSD so allocation analysis does not apply. Both  
21 sides agree they are financially viable entities who could afford to continue to litigate this case to  
22 final resolution but determined in was in their respective best interests to avoid substantial  
23 additional litigation expenses to compromise their disputes. The settlement was reached after the  
24 close of discovery, and after CCSD filed potentially dispositive motions. Thus the parties were  
25 fully informed about the strengths and weakness of their claims and defenses. CCSD settled for  
26 less than it may have recovered at trial if successful without risking an adverse judgement for the  
27 \$5 million Travelers paid to complete the projects, and Travelers \$6.5 million counterclaim.  
28 Travelers acknowledged the difficulty of pursuing wrongful termination, delay and disruption



1 damages claims standing in the shoes of BTM which failed to complete the work and filed for  
2 bankruptcy protection.

3 Finally, the court requested a copy of the settlement agreement because the moving and  
4 responsive papers only summarized the terms of the agreement and did not specify what rights  
5 CCSD agreed to assign to Travelers. The motion discloses that there is another case pending in  
6 this court arising out of claims BTM has against one of its subcontractors, FAST Systems Inc.  
7 who allegedly failed to complete its work on the projects. Fidelity and Deposit Company of  
8 Maryland issued surety bonds on the project and Travelers has asserted claims against FAST and  
9 Fidelity is evaluating its legal rights with respect to other BTM subcontractors involved with the  
10 projects.

11 In the settlement agreement CCSD has agreed to the following assignment:

12 (c) Assignment. In exchange for and effective ten (10) business days  
13 after Travelers' payment to CCSD of the Settlement Payment and retroactive to  
14 the Effective Date, CCSD assigns, transfers and conveys to Travelers all of  
15 CCDC's rights arising out of or related to the Contracts with BTM, the Projects,  
16 the BTM Claims on the Projects, and the Action (as well as all related damages in  
17 connection therewith), including but not limited to all direct costs, resultant  
18 damages, liquidated damages (including the LDs set forth in **Exhibit C**), interest  
and fee claims thereon. The purpose of this assignment is to give Travelers the  
ownership of and the right to assert any and all claims that CCSD has asserted  
and/or could have asserted in any ongoing or future dispute/litigation that  
Travelers is or may eventually be involved in. The Parties' agree that this  
assignment does not affect CCSD's ownership of the equipment and renovations  
that BTM installed/performed on the Projects.

19 This is standard assignment language intended to allow Travelers to assert any claims  
20 CCSD had and/or could have asserted against subcontractors on the projects. Travelers received  
21 an assignment of rights allowing it to stand in the shoes of CCSD in any further dispute or  
22 litigation Travelers may be involved in arising out of the projects. This is not a secret  
23 assignment and cooperation agreement in which nominally adverse parties covertly agree to  
24 pursue a common goal of establishing liability against other potentially liable parties. Nothing in  
25 the terms of the settlement agreement settlement suggest it is the product of collusion, fraud or  
26 tortious conduct designed to injure non-parties.

27 In short, the court finds the parties' settlement is fair and appropriate.

28 Accordingly,

1           **IT IS ORDERED** Defendant Travelers Casualty and Surety Company of America's  
2 Motion for Determination of Good Faith Settlement (ECF No. 133) is **GRANTED**.

3           DATED this 18th day of August, 2016.

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6 PEGGY A. TEEN  
7 UNITED STATES MAGISTRATE JUDGE  
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